No. 79-257

In the Supreme Court of the United States

OCTOBER TERM, 1979

RUBATEX CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 601 F. 2d 147. The decision and order of the National Labor Relations Board (Pet. App. 11a-24a) are reported at 235 N.L.R.B. No. 113.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. The petition for a writ of certiorari was filed on August 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board acted within its discretion when it ordered petitioner, following a strike, to pay striking employees an amount equal to the bonus it had paid nonstriking employees.

STATUTES INVOLVED

Sections 8(a)(1) and 10(c) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and 160(c), are as follows:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> Section 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board * * * shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act * * *.

STATEMENT

1. Petitioner manufactures rubber products at its plant in Bedford, Virginia. On September 1, 1976, the union[1] struck petitioner following an impasse in negotiations for a new collective bargaining agreement. During the strike (which lasted until a new agreement was executed eight weeks later) 13 of the approximately 830 employees in the bargaining unit continued to work (Pet. App. 2a). About a month after the strike was settled and all the employees had returned to work, petitioner, without notice to the union, paid a bonus of $100 to nine of the unit employees who had worked throughout the strike, and $25 to four

[1]United Rubber, Cork, Linoleum and Plastic Workers of America, Local 240, AFL-CIO.

others who had worked during part of the strike.[2] No payments were made to the employees who had participated in the strike. Subsequently, the union requested information from petitioner about the payments, but received no substantive response (Pet. App. 2a-3a, 13a-14a).

2. The Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by paying the nonstriking employees a bonus. The Board stated (Pet. App. 16a) that the payments

> were grants of special benefits to employees who refrained from engaging in concerted activity and a denial of such benefits to employees who chose to engage in such protected activity. While not granted until after the strike ended, * * * the bonuses disadvantaged the striking employees *vis-a-vis* the nonstrikers and * * * this would have the impact of discouraging employees from engaging in protected activities in the future.

To remedy this violation,[3] the Board ordered that petitioner pay the striking employees $100, plus interest, to put them in the same position as the nonstrikers (Pet. App. 19a-20a).[4] The Board explained (Pet. App. 19a) that, in fashioning an "effective remedy":

[2]Petitioner also paid $24,225 in bonuses to 244 nonunion or supervisory employees who continued to work during the strike (Pet. App. 2a n.1).

[3]The Board also found (Pet. App. 17a-18a) that petitioner's failure to negotiate over the bonuses and its subsequent failure to provide the union the information it had requested about the bonuses violated Section 8(a)(5) and (1) of the Act.

[4]The Board also ordered petitioner to pay $75 plus interest to the four employees who had been paid $25 bonuses, since they were discriminated against for not working during the entire strike (Pet. App. 19a-20a n.4).

> Rescission would appear to be inappropriate and impractical and would, we believe, create greater discord among the employees than currently exists as a result of [petitioner's] illegal action. The only practical method, therefore, of restoring the statutorily required equality of treatment as between employees who engaged in concerted activity and those who refrained therefrom is to require the payment of an equivalent amount to the employees who did engage in the concerted activity and who were denied the payment.

3. The court of appeals (Pet. App. 1a-10a) enforced the Board's order.[5] The court found that the Board acted within its discretion in adopting the bonus payment remedy; noting that, while other remedies were possible, the Board's remedy was "the most effective and least disruptive * * * as far as the employees are concerned" (Pet. App. 7a). The court concluded that a cease and desist order alone, "even if posted, might well be ineffective in dispelling the apprehensions of those employees who are aware that non-strikers were treated more favorably in the past and know of no restriction on the company's ability to engage in the same behavior in the future" (*ibid.*). The court also agreed with the Board that rescission of the bonuses paid to nonstrikers would be impractical and would likely create more discord among the employees (*ibid.*). While recognizing that the total amount required of petitioner was a "not inconsequential" $82,000 plus interest, the court noted that "the record does not reflect whether payment of the sum

[5]One judge concurred in the finding of an unfair labor practice but dissented from the holding that the Board's remedy was appropriate (Pet. App. 8a-10a).

> would have a substantial adverse effect on [petitioner]. Absent such evidence, we cannot say that the payment prescribed by the Board was excessive" (Pet. App. 7a).[6]

ARGUMENT

It is well settled that the Board has broad discretion to remedy unfair labor practices. *International Association of Machinists* v. *NLRB*, 311 U.S. 72, 82 (1940); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194-195 (1941); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347 (1953); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216-217 (1964). On the other hand, Board orders may not be punitive (see, *e.g.*, *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 235-236 (1938)) or arbitrary (*Detroit Edison Co.* v. *NLRB*, No. 77-968 (March 5, 1979), slip op. 11-15).

The Board's order here was neither punitive nor arbitrary. It effectuated "a restoration of the situation, as nearly as possible, to that which would have obtained but for" the violation of the Act. *Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 194. As the Sixth Circuit recognized in *NLRB* v. *Aero-Motive Mfg. Co.*, 475 F. 2d 27, 28 (1973), when an employer pays a post-strike bonus only to nonstriking employees, it violates Section 8(a)(1) and (5) of the Act and "there appears to be no practical alternative to the remedy [*i.e.*, payment of similar amounts to strikers] prescribed by the Board."

[6]The court explained (Pet. App. 7a n.2):

> Since there were 830 employees in the bargaining unit, the sum of $82,000, plus interest, is probably equivalent to the payroll for the unit for only several days. The bonus voluntarily paid by [petitioner] to non-union or supervisory employees who worked during the strike amounted to $24,225. By these measures, the sum of $82,000 does not seem unduly burdensome.

Petitioner's argument (Pet. 7) that a simple cease-and-desist order would have been sufficient to "dispel[ ] any future implicit promise" of unlawful benefit overlooks the fact that the purpose of a Board remedy is not only to deter future violations, but to restore the *status quo ante* in the case at hand. As the Board and the court of appeals properly concluded (Pet. App. 7a, 16a-17a), a cease-and-desist order would have been insufficient to dispel the apprehensions created in the employees' minds by petitioner's unlawful conduct. Moreover, such an order would not have been sufficient to "restore equality between those unit employees who participated in the strike and those who did not" (Pet. App. 19a n.3). Finally, absent such a restoration, employees could not know with assurance that a future strike would not result in similar unlawful behavior by petitioner (Pet. App. 7a, 16a-17a).

Contrary to petitioner's contention (Pet. 10-11), the Board is not limited, in cases of Section 8(a)(1) violations, to issuing cease-and-desist orders. The authority conferred on the Board by Section 10(c) of the Act, 29 U.S.C. 160(c), to take "affirmative action * * * [to] effectuate the policies of [the] Act" applies to Section 8(a)(1) violations no less than to other violations of the Act, where such relief is necessary and appropriate to restore the *status quo ante*.[7]

[7]Petitioner's further argument (Pet. 8 n.4) that, because the amount to be paid was substantial, the Board abused its discretion is without merit. As the court of appeals noted, petitioner made no showing that the amount was excessive as to it and, indeed, the court of appeals concluded that the payment "is probably equivalent to the payroll for the unit for only several days" (Pet. App. 7a n.2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1979-10